16-1620-cv

United States Court of Appeals

for the

Second Circuit

DONALD WECHSLER, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

– v. –

HSBC BANK USA, N.A.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

KAI H. RICHTER
BROCK SPECHT
NICHOLS KASTER, PLLP
Attorneys for Plaintiff-Appellant
4600 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 256-3200

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1

ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 3

I. STATEMENT OF FACTS 3

II. PROCEDURAL HISTORY 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. THE STANDARD OF REVIEW IS DE NOVO 7

II. PLAINTIFF'S CLAIMS ARE NOT TIME BARRED 7

A. The Limitations Clause May Limit the Period of Recovery, But Cannot Immunize HSBC from Liability for Current and Ongoing Unlawful Conduct 8

B. The Series of Events Provision Does Not Unambiguously Apply to Intermittent Charges 13

C. Plaintiff Timely Filed Suit Within One Year of Many of the Unlawful Charges 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Abena v. Metro. Life Ins. Co.,
544 F.3d 880 (7th Cir. 2008) 10

Breed v. Ins. Co. of N. America,
46 N.Y.2d 351 (1978) 16

Brown & Guenther v. N. Queensview Homes, Inc.,
239 N.Y.S.2d 482 (1st Dept. 1963) 8

Burda v. Wendy's Int'l., Inc.,
659 F.Supp.2d 928 (S.D. Ohio 2009) 10

City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.,
637 F.3d 169 (2d Cir. 2011) 7

Continental Leather Co. v. Liverpool, Brazil & River Plate Steam Nav. Co.,
259 N.Y. 621 N.E. 207 (1932) 10, 11

Executive Plaza, LLC v. Peerless Ins. Co.,
22 N.Y.3d 511 (2014) 6, 9, 10, 11, 12

Federal Ins. Co. v. Am. Home Assur. Co.,
639 F.3d 557 (2d Cir. 2011) 15, 16

Guilbert v. Gardner,
480 F.3d 140 (2d Cir. 2007) 16

Heimeshoff v. Hartford Life & Acc. Ins. Co.,
134 S.Ct. 604 (2013) 12

Hirth v. Am. Ins. Co.,
No. 15 CIV. 3245 (GWG), 2016 WL 75420 (S.D.N.Y. Jan. 7, 2016) 13

Int'l Bus. Machines Corp. v. BGC Partners, Inc.,
No. 10 CIV. 128 PAC, 2013 WL 1775437 (S.D.N.Y. Apr. 25, 2013) 16

Int'l Fid. Ins. Co. v. Cnty. of Rockland,
98 F. Supp. 2d 400 (S.D.N.Y. 2000) 8, 13

JA Apparel Corp. v. Abboud,
568 F.3d 390 (2d Cir. 2009) 16

Miller v. Wolpoff & Abramson, L.L.P.,
321 F.3d 292 (2d Cir. 2003) 7

Nakahata v. N.Y.-Presbyterian Healthcare Sys., Inc.,
723 F.3d 192 (2d Cir. 2013) 5

Patane v. Clark,
508 F.3d 106 (2d Cir. 2007) 5

SB & W Realty Corp. v. M.B. Debt Corp.,
2012 WL 10007000 (N.Y.Sup. July 23, 2012) 17

Seiden Associates, Inc. v. ANC Holdings, Inc.,
959 F.2d 425 (2d Cir. 1992) 13, 16

The Richard Avedon Found. v. AXA Art Ins. Corp.,
2015 WL 558029 (N.Y. Sup. Feb. 4, 2015) 12

Rules and Statutes

28 U.S.C. § 1332(d)(2)(A) 1

Fed. R. Civ. P. 12(b)(6) 7

Other Authority

The American Heritage Dictionary of the English Language (4th ed. 2006) 16

JURISDICTIONAL STATEMENT

This is a putative class action lawsuit, in which Plaintiff-Appellant Donald Wechsler ("Plaintiff") asserts claims against Defendant-Appellee HSBC Bank USA ("HSBC") for breach of contract and violation of the New York Deceptive Practices Act ("NYDPA), based on allegedly unauthorized account maintenance fees that were charged to his "Everyday Savings Account" and the savings accounts of other putative class members. The District Court exercised jurisdiction over this matter pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A). As alleged in the operative First Amended Complaint, the amount in controversy exceeds $5,000,000, there are more than 100 putative class members, and many members of the putative class are citizens of states other than HSBC. *A-52*.

The District Court issued a Memorandum Opinion and Order dismissing Plaintiff's claims on April 26, 2016 (*A-109*), and subsequently entered final judgment disposing of all claims on April 27, 2016. *A-116*. Appellant timely filed a Notice of Appeal on May 20, 2016. *A-119*. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in concluding that both of Plaintiff's causes of action are time barred under a contractual limitations provision that effectively prevents Plaintiff from seeking redress for current and ongoing unlawful conduct.

2. Whether the District Court erred in applying the series-of-events clause in the limitations provision to the unlawful fees charged in this case, where the meaning of the clause is ambiguous and the fees at issue were levied intermittently.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

HSBC Bank USA, N.A., ("HSBC") promotes its "Everyday Savings Account" as having ***no*** monthly maintenance fee. *A-63.* But in January 2014, HSBC began charging Plaintiff a $5 monthly maintenance fee in connection with his Everyday Savings Account. *A-53; A-107*. Although the names of both the bank and the account changed over the years, Plaintiff held this same account for more than 35 years, and had never previously been charged a monthly fee. *A-52 – A-53.*[1]

Plaintiff complained to HSBC about the imposition of these unauthorized fees in December of 2014 and again in May of 2015. *A-54.* In response, HSBC asserted that it was entitled to charge a $5 monthly fee whenever his account balance fell below $500, despite the fact that the governing "Terms and Charges Disclosure" for Everyday Savings Accounts contains no such provision, and in fact, unambiguously states that the "Monthly Maintenance Fee" is "$0." *A-53 – A-54; A-63.*[2]

---

[1] Plaintiff opened a savings account with Marine Midland Bank over 35 years ago. *A-52.* In 1980, Marine Midland was purchased by HSBC, and Plaintiff's account underwent a series of changes, going from a "Premium Money Market" savings account to a "Regular Savings Account," and, in 2012, an HSBC "Everyday Savings Account" (the "Account"). *Id.*

[2] HSBC disputes that this Terms and Charges Disclosure governs Plaintiff's Everyday Savings Account. However, at this stage, the Court must accept Plaintiffs' allegations as true. At the time this action was filed, the Terms and Charges Disclosure was publicly available on HSBC's website, and it does not

Each time that Plaintiff complained about the fees, HSBC agreed to reverse certain charges. *A-54*. However, in each instance, HSBC later began imposing additional maintenance fees on Plaintiff's account. *Id.* After accounting for the reversals, Plaintiff was charged each month from January to June 2014, then not charged again until December 2014, after which he was intermittently charged between December 2014 and the commencement of this action in July 2015. *A-105 – A-108.*

II. PROCEDURAL HISTORY

In order to address this ongoing problem, Plaintiff filed this putative class action on July 28, 2015, alleging that HSBC imposed unauthorized account maintenance fees on his Everyday Savings Account and the savings accounts of other depositors. *A-1 – A-5.* After HSBC moved to dismiss, Plaintiff filed a First Amended Complaint ("FAC"). *Id; A-51 – A-61.* In the FAC, Plaintiff asserted causes of action for breach of contract and violation of the NYDPA, on behalf of himself and other putative class members. *Id.*

HSBC responded to Plaintiff's FAC by again moving to dismiss the action under Rule 12(b)(6). *A-1 – A-5.* HSBC's motion was supported by a declaration from a bank employee attempting to dispute the factual allegations in the FAC, and attaching numerous additional documents that HSBC alleges were provided to

---

state anywhere that it is limited to new accounts, accounts opened through the internet, or any other subset of Everyday Savings Accounts.

Plaintiff or otherwise relate to his account. *A-6 – A-50*. The District Court properly refused to consider this extraneous declaration and its attachments. *A-110*.[3]

Nonetheless, the District Court dismissed both of Plaintiff's claims, concluding that they were time barred because Plaintiff was obligated to file this action within one year of the ***first*** instance in which HSBC charged an unlawful monthly fee. *A-109 – A-115*. The District Court's decision was based on language from the account agreement purporting to require that any legal action related to the account be instituted within one year of the date the problem occurred, and if part of a series of events, within one year of the first event. *Id.; see also A-98.* Plaintiff appeals from the District Court's erroneous Order and the resulting Judgment. *A-109 – A-115; A-116; A-119 – A-120.*

[3] As a general rule, courts "do not consider matters outside the pleadings in deciding a motion to dismiss for failure to state a claim." *Nakahata v. N.Y.-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 202 (2d Cir. 2013). The Court may only consider documents outside the complaint "that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *Patane v. Clark*, 508 F.3d 106, 112 (2d Cir. 2007). In the FAC, Plaintiff did not rely upon any of the extraneous materials submitted by HSBC. Accordingly, this Court also should decline to consider these materials, although HSBC insisted on including them in the Joint Appendix.

SUMMARY OF THE ARGUMENT

The District Court's conclusion that Plaintiff's claims are time barred under the contractual limitations provision is erroneous for at least two reasons. First, the District Court's application of the relevant provision to the facts of this case resulted in a grant of effective immunity from liability for HSBC's current and ongoing unlawful activity. This conclusion runs afoul of New York law, which holds that contractual limitations provisions must be reasonable in all circumstances, and are unenforceable when they result in a nullification of a claim, as is the case here. *See Executive Plaza, LLC v. Peerless Ins. Co.*, 22 N.Y.3d 511 (2014).

Second, in dismissing Plaintiff's claims as untimely under the contractual limitations provision, the District Court implicitly held that provision's "series of events" clause – which purports to require that any suit based on a "series of events" be filed within one year of the first such event – unambiguously applies to the intermittent fees unlawfully charged by HSBC in this case. That is incorrect. Here, it is, at most, ambiguous whether the language of the provision applies to the facts of this case, and the issue should not have been resolved against Plaintiff on a motion to dismiss. For these reasons, the District Court's judgment should be vacated and the case remanded for further proceedings.

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*.

Because this case was dismissed on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the standard of review is *de novo*. *See Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003) ("Our standard of review for both motions to dismiss and motions for summary judgment is *de novo*."). "A district court's legal conclusions, including its interpretation and application of a statute of limitations, are likewise reviewed *de novo*." *City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011).

II. PLAINTIFF'S CLAIMS ARE NOT TIME BARRED.

The District Court concluded that both of Plaintiff's claims are time barred under HSBC's "Rules for Consumer Accounts" (the "Rules"). *A-109 – A-115*. The relevant provision of the Rules reads in full:

> **Limitation of claims**
> You agree to make any claim or bring any legal action relating to the Bank's handling of your account, in writing, within one (1) year of the date the problem occurred, unless these Rules or applicable law or regulation require earlier action by you. You agree that if the problem involves a series of events, such as a number of forgeries over a period of time, then the date the first event occurred shall be the date by which the period to make any claim or bring any legal action shall begin to run.

A-98 (the "Limitations Clause").

However, under New York law,[4] such contractual limitations provisions must be reasonable in light of the particular circumstances of the case, and are unenforceable when they result in a nullification of a claim, as was the case here. Moreover, the "series of events" language in the Limitations Clause does not unambiguously apply to the sort of intermittent charges at issue here. Accordingly, the District Court's judgment should be vacated and the case remanded for further proceedings.

A. The Limitations Clause May Limit the Period of Recovery, But Cannot Immunize HSBC from Liability for Current and Ongoing Unlawful Conduct.

While the District Court correctly noted that parties can, in certain circumstances, contract to narrow the statute of limitations period for a breach of contract action, "contracts of this sort are viewed with caution by the courts, and are construed strictly against the party invoking the shorter period." *Int'l Fid. Ins. Co. v. Cnty. of Rockland*, 98 F. Supp. 2d 400, 409 (S.D.N.Y. 2000). Further, "the shorter period selected must be reasonable." *Id.* Where "the limited time is unconscionable, unfair, [or] unreasonable" the provision is "therefore unenforcible [sic]." *Brown & Guenther v. N. Queensview Homes, Inc.*, 239 N.Y.S.2d 482, 484 (1st Dept. 1963).

---

[4] The parties agree that New York's substantive law governs this case. *A-112.*

Here, even assuming that the one-year limitations period set forth in the Limitations Clause is reasonable, the accrual period is not. HSBC's Rules state that legal claims must be brought within one year, and then further provide that "if the problem involves a series of events, such as a number of forgeries over a period of time, then the date the first event occurred shall be the date by which the period to make any claim or bring any legal action shall begin to run." *A-98*. The District Court interpreted this language to foreclose Plaintiff from seeking any relief for recently-imposed unlawful charges, because HSBC first began imposing unlawful charges more than a year ago. Put another way, under the District Court's reading of the Limitations Clause, HSBC is immune from liability and can continue to impose unlawful charges in perpetuity simply because Plaintiff did not file a legal action to recover the initial charges that were levied against his account within one year. This is not reasonable – to the contrary, it is manifestly ***un***reasonable.

New York courts will not hesitate to invalidate a contractual limitations provision that has the effect of immunizing a defendant from liability. The leading case is *Executive Plaza, LLC v. Peerless Ins. Co.*, 22 N.Y.3d 511 (2014). In that matter, the New York Court of Appeals refused to enforce a contractual limitations provision that was "simply a nullification of a claim." *Id.* at 518. In doing so, the Court of Appeals adopted Judge Crane's dissenting opinion in an earlier case as the correct rule of law:

> The period of time within which an action must be brought should be fair and reasonable, in view of the circumstances of each particular case. The circumstances, not the time, must be the determining factor.

Id. at 519 (quotation, alteration, and ellipses omitted), *quoting Continental Leather Co. v. Liverpool, Brazil & River Plate Steam Nav. Co.*, 259 N.Y. 621, 182 N.E. 207 (1932) (Crane, J., dissenting).

In the particular circumstances of this case, the result reached by the District Court is anything but fair and reasonable. HSBC has continued to assess unlawful maintenance fees against Plaintiff's account, and the District Court's interpretation of the Limitations Clause would allow HSBC to continue charging these unlawful fees in perpetuity, depriving Plaintiff of any remedy for both past ***and future*** harms. While it may be reasonable to prevent Plaintiff from recovering for charges imposed more than one year before he filed his initial Complaint, it is not fair and reasonable to grant HSBC perpetual immunity for ongoing and future unlawful conduct. *See Abena v. Metro. Life Ins. Co.*, 544 F.3d 880, 884 (7th Cir. 2008) ("it would be unreasonable to enforce a limitations period that ended before the claim could have even accrued"); *Burda v. Wendy's Int'l., Inc.*, 659 F.Supp.2d 928, 939-40 (S.D. Ohio 2009) (finding an accrual clause that would require suit for ongoing antitrust violations within two years of the first such violation to be "unfair and unreasonable"). The New York Court of Appeals has made clear that limitations periods that essentially nullify the underlying claims are inherently unreasonable and unenforceable. *Id.* at 518-19, 5 N.E.3d at 992.

The fact that Plaintiff initially contested the fees with HSBC and secured reversal of past charges further bolsters this conclusion. As noted above, HSBC began charging the unlawful fees in January 2014. Plaintiff first contacted HSBC about the fees on December 18, 2014, a few weeks before the expiration of the limitations period as interpreted by the District Court. *A-54; A-108.* At that time, HSBC agreed to reverse the two most recent charges, from July and November 2014. *A-108.* Having secured partial satisfaction, it is not reasonable to hold that Plaintiff nevertheless was required to file suit ***at that time*** in order to prevent HSBC from charging additional unlawful fees ***in the future***. To expect – indeed require – customers like Plaintiff to bring suit under these circumstances would not be reasonable, and would perversely encourage parties to resort to litigation even where the matter at issue had apparently been resolved. As Judge Crane's dissent in *Continental Leather* noted, "courts should not, by such short limitations, encourage hasty and unfounded litigation." 259 N.Y. 621, 625, 182 N.E. 207, 209.

The District Court's ruling here is unprecedented. The court's interpretation of the Limitations Clause prevents Plaintiff from seeking redress for ongoing and future unlawful conduct and immunizes HSBC from liability for that conduct in perpetuity. The District Court cited no case law supporting such an outcome.

Instead, the District Court relied primarily on *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, where the Court held that parties are allowed to agree "not only to the length of a limitations period but also to its commencement." 134 S.Ct. 604, 611 (2013). But the holding in *Heimeshoff* is inapposite because the Court was not confronted with a situation in which application of the contractual provision would result in the effective nullification of claims for ***current*** and ***ongoing*** wrongdoing – *Heimeshoff* involved the one-time denial of benefits under ERISA. *Id.* at 608-09. Indeed, the Court's opinion in *Heimeshoff* actually supports reversal here, because the Court recognized that limitations provisions must be "reasonable" to be enforceable, and that "in the rare cases" where the provision would effectively preclude a plaintiff from seeking redress, "courts are well equipped to apply traditional doctrines that may nevertheless allow [plaintiffs] to proceed." *Id.* at 615.

This is just such a rare case. Traditional doctrines of New York contract law require that a limitations clause must be "fair and reasonable, in view of the circumstances of each particular case." *Executive Plaza*, 22 N.Y.3d at 519 (quotation omitted); *see also The Richard Avedon Found. v. AXA Art Ins. Corp.*, 2015 WL 558029, at *9 (N.Y. Sup. Feb. 4, 2015) (action commenced three months after expiration of contractual limitations period nevertheless timely given "the particular circumstances of this case"). Given the unique circumstances of this case, where the unlawful activity is ongoing and likely to continue in the future, it is unreasonable to enforce a clause in a manner that results in the nullification of a claim, as the District Court did here.

B. The Series of Events Provision Does Not Unambiguously Apply to Intermittent Charges.

The District Court also erred by holding that the series of events provision applied to fees that were only charged intermittently to Plaintiff's account. Under the circumstances here, it is, at most, ambiguous whether the series of events provision applies, and the issue should not have been resolved against Plaintiff as a matter of law on a motion to dismiss.

"New York case law … requires precision in suit limitation language." *Hirth v. Am. Ins. Co.*, No. 15 CIV. 3245 (GWG), 2016 WL 75420, at *5 (S.D.N.Y. Jan. 7, 2016). Accordingly, New York courts adhere to the maxim that "contracts of this sort are viewed with caution by the courts, and are construed strictly against the party invoking the shorter period." *Int'l Fid. Ins. Co. v. Cnty. of Rockland*, 98 F. Supp. 2d 400, 409 (S.D.N.Y. 2000). Moreover, any ambiguity in the contract "must be resolved … against the moving party." *Seiden Associates, Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 429 (2d Cir. 1992).

HSBC's Rules do not define a "series of events." Instead, the Rules provide a single example: "a number of forgeries over a period of time." *A-98*. Far from meeting the required standard of precision, the meaning of this provision is insolubly ambiguous, as it begs the question of what number and over how long a period of time. For example, if Plaintiff's account had been subject to thirteen forgeries on consecutive weeks in the first quarter of 2015, it could be reasonable to interpret those forgeries as a "series of events" such that the one-year limitations period related to those forgeries expired in the first week of January 2016, on the one-year anniversary of the first forgery. On the other hand, had those forgeries in 2014 been preceded by one forgery shortly after Plaintiff opened his account in 1980, and a handful of forgeries over the course of the next 25 years, it would be patently unreasonable to interpret the series of events provision to preclude suit on the 2014 forgeries based on the theory that the limitations period to file suit on the 2014 forgeries expired on the anniversary of the first forgery in 1981 – 33 years before the 2014 forgeries occurred.

The same problem is present here. HSBC levied fees on Plaintiff's account each month for the first six months of 2014. *A-105 – A-108.* After that, HSBC charged no fees for the next five months (charges in July and August were initially levied but later reversed). *Id.* Then, starting in December 2014, HSBC charged fees in four of the next seven months. *Id.* These charges are shown in the following table:

	Month	Fee Charged	Note
2014	January	X	
	February	X	
	March	X	
	April	X	
	May	X	
	June	X	
	July		Charged initially but reversed on 12/18
	August		
	September		
	October		
	November		Charged initially but reversed on 12/18
	December	X	
2015	January	X	
	February		Charged initially but reversed on 5/20
	March	X	
	April		
	May	X	
	June		

A-105 – A-108. Are the intermittent charges beginning in December 2014 part of a "series of events" that occurred from January to June of 2014, notwithstanding the five-month gap from July to November 2014? What if the gap was five years, rather than five months? Or fifteen years? The terms of the contract provide no clear and unambiguous answers to these questions.

The ordinary meaning of a "series" further undercuts the District Court's conclusion. When the terms of a contract are unclear, New York courts sometimes refer to dictionary definitions to supply the ordinary meaning of a term. *Federal*

Ins. Co. v. Am. Home Assur. Co., 639 F.3d 557, 567 (2d Cir. 2011). The dictionary definition of a "series" is "[a] number of objects or events arranged or coming ***one after the other in succession***." *The American Heritage Dictionary of the English Language* 1589 (4th ed. 2006) (emphasis added). Here, given the lengthy gap in fees levied between June and December 2014, it is clear that the fees did not occur "one after the other in succession."

As applied to the particular facts of this case, the series of events provision lacks "a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion." *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 396 (2d Cir. 2009) (quoting *Breed v. Ins. Co. of N. America*, 46 N.Y.2d 351, 355 (1978)). Accordingly, judgment as a matter of law against Plaintiff was improper. *Id.*; *Seiden Associates*, 959 F.2d at 430.

C. Plaintiff Timely Filed Suit Within One Year of Many of the Unlawful Charges.

Under New York law, if a "contract requires continuing performance over a period of time, each successive breach may begin the statute of limitations running anew." *Guilbert v. Gardner*, 480 F.3d 140, 150 (2d Cir. 2007) (citing cases); *see also Int'l Bus. Machines Corp. v. BGC Partners, Inc.*, No. 10 CIV. 128 PAC, 2013 WL 1775437, at *1-2 (S.D.N.Y. Apr. 25, 2013) (applying contractual limitations period of two years, but finding suit not barred because of breaches occurring within that time period.); *SB & W Realty Corp. v. M.B. Debt Corp.*, 2012 WL 10007000, *1 (N.Y.Sup. July 23, 2012) (same). Here, ***all*** of the intermittent charges that followed the initial series of charges occurred within one year of the filing of the initial complaint. As a result, Plaintiff's claims are timely even if the contractual provision is enforceable.

CONCLUSION

The District Court erroneously concluded that Plaintiff's causes of action were time barred under a contractual limitations provision that is insolubly ambiguous and, as interpreted by the District Court, effectively prevents Plaintiff from seeking redress for current and ongoing unlawful conduct. This decision should be reversed, the District Court's judgment should be vacated, and this matter should be remanded for further proceedings.

Dated: July 11, 2016

Respectfully submitted,

NICHOLS KASTER, PLLP

BY: /s/ *Kai H. Richter*
Kai H. Richter, MN Bar #0296545*
Brock J. Specht, MN Bar #0388343*
4600 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2242
Telephone: 612-256-3200
Facsimile: 612-338-4878
krichter@nka.com
bspecht@nka.com

*admitted to practice in the Second Circuit

ATTORNEYS FOR PLAINTIFF-APPELLANT

CERTIFICATE OF COMPLAINCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-point Times New Roman proportional font, and as calculated by my word processing software (Microsoft Word), contains 3,658 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: July 11, 2016

/s/ *Kai H. Richter*
Kai H. Richter
Counsel for Plaintiff-Appellant